

**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

**Case No. 24-ICA-398**

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**U.S. BANK TRUST NATIONAL ASSOCIATION AS TRUSTEE OF LB-RANCH  
SERIES V TRUST**

PLAINTIFF BELOW, PETITIONER,

**V.**

**DUNCAN HOMES, LLC**

DEFENDANT/THIRD-PARTY PLAINTIFF BELOW, RESPONDENT,

**AND**

**CONRAD LEGAL CORPORATION**

THIRD PARTY DEFENDANT BELOW, RESPONDENT.

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ON APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

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**PETITIONER'S REPLY  
BRIEF**

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**Counsel for Petitioner, U.S. Bank Trust National  
Association as Trustee of LB-Ranch Series V Trust**

Lakyn Cecil, Esq. (WVSB #14121)  
Samuel I. White, P.C.  
5000 Coombs Farm Drive, Suite 104 Morgantown, West Virginia, 26508  
(O) 304.413.0010 ext. 5303  
(F) 304.413.0014  
Email: Lcecil@SIWPC.com  
*Counsel for Petitioner*

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## INTRODUCTION

Despite their obvious discovery violations leading to the creation of genuine issues of material fact post-discovery, Respondents argue that the Circuit Court properly granted Summary Judgment in their favor. However, the record reflects that the introduction of incurable and highly prejudicial evidence after the close of a 15-month discovery period, despite Petitioner's opposition, clearly created a genuine issue of material fact and deprived Petitioner of its ability to utilize the discovery period to vitiate any contradictory claims.

## ARGUMENT

### **I. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT BECAUSE PERMITTING THE DISCLOSURE OF PREJUDICIAL EVIDENCE AFTER THE CLOSE OF DISCOVERY INTRODUCED GENUINE ISSUES OF MATERIAL FACT FOR TRIAL.**

At the summary judgment stage in the case *sub judice*, the Circuit Court's only obligation was to determine whether a genuine issue of material fact existed for trial. *Peavy*, 192 W. Va. 189, 451 S.E.2d 755, Syl. Pt. 3 (1994). At the close of a 15-month long discovery period, it was undisputed that Respondents produced absolutely no evidence at all which would contradict the allegations set forth in Petitioner's Complaint and the relief sought therein, and was clear that there existed no genuine issue of fact to be tried and summary judgment in favor of the Petitioner was proper.

Prejudicially, however, Respondents presented new documents and new defenses in their cross-motion for summary judgment, well *after* the close of the discovery period. This post-discovery disclosure of prejudicial documents and defenses clearly created a genuine issue of material fact and deprived Petitioner of its ability to utilize the discovery period to vitiate any contradictory claims and was a violation of the purpose, letter, and spirit of Discovery, was clearly prejudicial to Petitioner, and was sanctionable. Despite Petitioner's objections and motions in

opposition to the introduction of this prejudicial evidence at such a late stage in the case, the Circuit Court permitted the documents and defenses to come in.

The Circuit Court erred in granting the Respondents' cross-motions for summary judgment because it is clear that the introduction of the prejudicial evidence created genuine issues of material fact: (1) was the Petitioner's predecessor in title, Bayview, an interested party entitled to due process in the form of notice of the tax sale and of its right to redeem?; (2) did Respondent Duncan Homes comply with due process notice requirements and the requirements of West Virginia Code Sections 11A-3-1, *et seq.*?

## **II. THE CIRCUIT COURT ERRED BY FAILING TO FIND THAT THE PETITIONER'S PREDECESSOR'S INTEREST WAS NOT EXTINGUISHED BY THE APRIL 1, 2014 TAX SALE DEED.**

On or around November 14, 2012, RAI Custodian WV TL ("RAI") purchased the Property at a tax sale (the "2012 Tax Sale"). A.R. Vol. 1, p. 239. ¶10.<sup>1</sup> Shortly after the 2012 tax sale and after the tax sale deed was issued, the tax sale purchaser's assignee, American Pride Properties, quitclaimed its right and interest to the Property unto the original Property owner, Richard S. Palmer effectively permitting him to redeem the Property subsequent to the original redemption period for \$12,200.00, an amount almost identical to the redemption cost plus the taxes paid since with interest.<sup>2</sup> *Id.*

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<sup>1</sup> In its brief, Respondent Duncan Homes' misstates that Associates Financial Services, Inc. was served with a redemption notice. The documents, however, show otherwise. The redemption notice was *attempted* via mail, to only one single address, upon Associates Financial Services, Inc., beneficiary of the June 21, 2000 Deed of Trust at the time of the Tax Sale. A.R. Vol. 1, pp. 273-280. However, the notice was returned to the sender. Notice was not attempted again via mail, or to any other mailing address, despite the specific statutory provision advising that notice served by publication should only be used if the person cannot be discovered by due diligence on the part of the purchaser. W. Va. Code §11A-3-22 (2014).

<sup>2</sup> The re-conveyance of the Property back to the original owner and delinquent taxpayer, Richard S. Palmer, effectively rendered the 2012 Tax Sale, and any legal claims disputing the validity of the 2012 Tax Sale which Associates Financial Services, Inc. would have had pursuant to West Virginia Code Section 11-A-4-1, *et seq.*, moot and unnecessary.

It is a general principle in all such cases that Richard S. Palmer cannot acquire a tax-title upon the Property through his own default and defeat the lien of Plaintiff's predecessor in title. *Summers v. County of Kanawha*, 26 W. Va. 159, 169 (1885) Although West Virginia has not specifically stated whether a tax-delinquent property owner can strengthen his title by redeeming the Property from a third-party subsequent to the Tax Sale instead of purchasing the property at the tax sale himself, the "underlying principle of disallowing a benefit to flow from a dereliction of duty remains applicable," and other Courts have ruled that he cannot. (*See UMLIC VP LLC v. T & M Sales & Envtl. Sys.* 176 SW. 3d 595, 607 (Ct App. TX Sept. 15 2005).<sup>3</sup> A purchase made by, or on behalf of Richard S. Palmer, instead operates only as a payment of delinquent taxes, rendering Plaintiff's lien valid and enforceable. *County of Kanawha*, 26 W. Va. at 169.

Additionally, the West Virginia Legislature did not intend for delinquent landowners and tax sale purchasers to utilize the delineated provisions of Chapter 11A to schematically purchase delinquent property in order to eliminate any liens on title and subsequently re-convey all rights and interest in the Property back to the delinquent landowner.

Furthermore, Richard S. Palmer entered into a Loan Modification Agreement after the 2012 Tax Sale, and after he effectively redeemed the Property from American Pride Properties, modifying the principal balance, interest rate, and monthly payment terms of the June 21, 2000, and *re-confirming* the original, valid Deed of Trust. A.R. Vol. 2, p. 448.

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<sup>3</sup> Also see *Dillman v. Foster*, 656 P.2d 974, 979 (Ut. S. Ct. Oct. 26, 1982) holding that "one who is under a duty to pay taxes cannot shirk that duty and then take advantage of it by purchasing the land at tax sale, and that if he does so it will not strengthen his title."

### **III. THE CIRCUIT COURT ERRED BY FINDING THAT RESPONDENT DUNCAN HOMES, LLC SATISFIED ITS CONSTITUTIONAL AND STATUTORY REQUIREMENTS AS A TAX SALE PURCHASER.**

The decisions of our courts have made it clear that there are recognized constitutional due process notice requirements for identifiable parties having an interest in property subject to delinquent tax sales. “Where a party having an interest in the property can be reasonably identified from public records or otherwise, due process requires that such party be provided notice by mail or other means as certain to ensure notice.” *Archuleta v. U.S. Liens, LLC*, 240 W. Va. 519, 521 (citing *Lilly v. Duke*, 180 W. Va. 228, 376 S.E.2d 122 (1988)).<sup>4</sup>

Furthermore, the West Virginia Legislature explicitly “carved out detailed statutes that regulate every aspect of the sale of real property for delinquent taxes and the redemption of such property” and enumerated the importance of protecting parties’ interests in real property. W. Va. Code § 11A-3-1, *et seq.* (2020). Specifically, the Legislature sought to ensure that property owners, lienholders, and other interested parties would be provided adequate notice of their right to redeem delinquent property. W.Va. Code §§11A-3-19; 11A-3-52 (2020).

As the purchaser of the Property, and pursuant to the aforementioned specific statutory provisions enacted by the Legislature and constitutional due process notice requirements, Respondent Duncan Homes was required to, at the very least, exercise reasonably diligent efforts by performing a title examination to identify all parties of record that have an interest in the Property and prepare a list of those interested parties of record to be served with notice of the Tax Sale and of their right to redeem the Property. In this case, Petitioner’s predecessor was a reasonably identifiable party of record with an interest in the Property. It is undisputed that

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<sup>4</sup> *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 800, 103 S. Ct. 2706 (1983); *Anderson v. Jackson*, 180 W. Va. 194, 375 S.E.2d 827 (1988); *Wells Fargo Bank, N.A. v. Up Ventures II, LLC*, 223 W.Va. 407, 411, 675 S.E.2d 883 (2009); *Mason v. Smith*, 233 W. Va. 673, 760 S.E.2d 487 (2014).

Respondent Duncan Homes failed to list Petitioner's predecessor as an interested party of record and failed to provide Petitioner's predecessor with proper notice of the Tax Sale and of its right to redeem.

Accordingly, Duncan Homes indubitably failed to uphold its statutory and constitutional requirements as a tax sale purchaser and thus must lose all benefits of its purchase, and the Tax Sale Deed should be set aside.

### **CONCLUSION**

The Petitioner prays that this Court find that the Circuit Court of Berkeley County erred in granting Defendant/Third-Party Plaintiff Respondent Duncan Homes, LLC and Third-Party Defendant Respondent Conrad Legal Corporation's motions for summary judgment; that this Court reverse the Circuit Court of Berkeley County's admission of prejudicial evidence not disclosed during discovery; reverse the Circuit Court of Berkeley County's order granting summary judgment entered August 23, 2024; order the Circuit Court to enter judgment in favor of Petitioner; or alternatively remand this matter for further discovery and proceedings.

Respectfully submitted,

**U.S. Bank Trust National Association,  
as Trustee of LB-Ranch Series V Trust,**  
*Petitioner, by Counsel*

/s/ Lakyn D. Cecil  
Lakyn D. Cecil, Esquire (WV Bar #14121)  
*Counsel of Record for Petitioner*



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THIRD PARTY DEFENDANT BELOW, RESPONDENT.

**CERTIFICATE OF SERVICE**

I, the undersigned, counsel for U.S. Bank Trust National Association as Trustee of LB-Ranch Series V Trust, hereby certify that on this 7<sup>th</sup> day of January, 2024, I caused a true and accurate copy of the foregoing **Petitioner's Reply Brief** to be served on counsel of record via File and Serve Xpress, which will provide notice of the same to the following parties:

**Eric S. Black, Esq. (WWSB #7567)**  
380 South Washington Street  
Berkeley Springs, West Virginia 25411  
*Counsel for Respondent Duncan Homes, LLC*

**J. Peter Glaws, IV (WVSB #13401)**  
Carr Maloney, P.C.  
2000 Pennsylvania Avenue, N.W.  
Suite 8001  
Washington, DC 20006  
*Counsel for Respondent  
Conrad Legal Corporation*

/s/ Lakyn D. Cecil  
Lakyn D. Cecil, Esquire (WV Bar #14121)